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Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

JOSEFA FUENTES,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit is correct in its determination that under 18 U.S.C. 924(c)(1), which makes it a crime to use or carry a firearm during a drug trafficking crime, an alleged narcotics conspiracy and an alleged substantive narcotics offense can always constitute separate predicate offenses allowing multiple punishments for both first and "second or subsequent" convictions, regardless of whether proof of the same conduct is used to convict of both predicate offenses?

2. Whether the imposition of the twenty-year consecutive term of custody for a "second or subsequent conviction" of 18 U.S.C. 924(c)(1) is proper where a narcotics conspiracy conviction and a substantive narcotics conviction are obtained by proof of the same conduct and are further intertwined because a *Pinkerton* jury instruction allowed a conviction on all substantive charges upon proof of the conspiracy charge?

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

United States of America, plaintiff-appellee
Rolando Lopez, defendant-appellant
Josefa Fuentes, defendant-appellant

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No.

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JOSEFA FUENTES,
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v.
UNITED STATES OF AMERICA,
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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Josefa Fuentes, respectfully prays that a Writ of Certiorari issue to review the published opinion of the United States Court of Appeals for the Ninth Circuit entered November 14, 1994, affirming the conviction and sentence imposed on petitioner in the United States District Court for the Central District of California.

OPINIONS BELOW

The citation of the opinion of which review is sought is *United States v. Lopez*, et al., 37 F.2d 565 (9th Cir. 1994).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 1254(1)

The United States Court of Appeals entered its decision on November 14, 1994, upon denial of a petition for rehearing.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Title 18 United States Code, Section 924(c)(1) states: "Whoever, during and in relation to any . . . drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such . . . crime, be sentenced to imprisonment for five years . . . . In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years . . . ."

The Fifth Amendment to the United States Constitution states in part: "No person shall . . . be deprived of life, liberty or property, without due process of law . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . . "

The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

Josefa Fuentes, together with her husband, Rolando Lopez, were indicted on October 29, 1991 in a multi-count indictment charging Ms. Fuentes with conspiracy, possession with intent to distribute a controlled substance, distribution of a controlled substance and two counts of using and carrying a firearm in relation to a drug trafficking crime.

Both firearms charges were alleged to have been committed on October 16, 1991. One firearms count relied upon the alleged conspiracy as a "predicate" offense. The remaining firearms count relied on the alleged possession of narcotics as a "predicate" offense.

The same conduct was proven at trial to obtain the conspiracy and substantive narcotics convictions. Furthermore, at the government's request, the District Court instructed the jury on the "Pinkerton" theory, which allowed the jury to convict Ms. Fuentes of any substantive offense committed in furtherance of the conspiracy, so long as she was found to be a conspirator. *See Pinkerton v. United States*, 328 U.S. 640, 645-46 (1946) *reh. denied*, 329 U.S. 818 (1946). The jury returned guilty verdicts against Ms. Fuentes on all counts.

Title 18 U.S.C. Section 924(c)(1) requires a consecutive five-year term of imprisonment for any person who uses or carries a firearm during and in relation to a drug trafficking crime. Section 924(c)(1) also provides for a consecutive twenty-year term of imprisonment for any person suffering a "second or subsequent conviction" under that subsection. The district court sentenced Ms. Fuentes to concurrent custodial terms of 63 months on the narcotics charges, a consecutive 60 month term on the firearms charge based upon her conviction for conspiracy, and a consecutive 240 month term on the firearms charge based on the substantive possession with intent to distribute charge, for a total custodial sentence of 363 months.

The District Court had jurisdiction pursuant to 18 U.S.C. § 3231. A Notice of Appeal was timely filed. The Ninth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

The Court of Appeals, in a published opinion, affirmed Ms. Fuentes' conviction and sentence. The Court concluded that "possession with intent to distribute and conspiracy are

two separate offenses for section 924(c) purposes," relying upon *dicta* from the Fifth Circuit Court of Appeals opinion in *United States v. Privette,* 947 F.2d 1259 (5th Cir. 1991). In *Privette,* the Court of Appeals vacated a conviction and sentence on one firearms count on double jeopardy grounds because the defendant might have been convicted twice for using firearms during a single predicate offense. *Id.* at 1260-1262. In *dicta,* the court stated that Privette's conviction of conspiracy and his conviction of possession with intent to distribute could each have supported separate section 924(c)(1) convictions and sentences, because a conspiracy and its target crimes are separate offenses for double jeopardy purposes. *Id.*

SUMMARY OF ARGUMENT

The published opinion below concludes that an alleged narcotics conspiracy and an alleged substantive narcotics offense may always constitute separate offenses requiring a consecutive five-year sentence followed by a consecutive twenty-year sentence for the "second or subsequent conviction" under section 924(c)(1), regardless of whether proof of the same conduct results in both convictions. By so ruling, the court below is in conflict with the decisions of this Court, the decisions of other circuits and the clear intent of Congress. The published opinion also establishes an arbitrary and unjustified rule regarding the imposition of the harsh twenty-year consecutive term of custody for "second or subsequent" convictions of section 924(c)(1).

The opinion below is in direct conflict with the published opinions of this Court and the Ninth and other circuits, which would require proof of separate conduct to support the enhanced twenty-year penalty for a "second or subsequent" section 924(c) conviction.

The opinion below is also in direct conflict with this Court's decisions which interpret the Double Jeopardy

Clause as prohibiting greater punishment than the legislature intended. Both the specific language of the statute and the legislative history of the statute confirm that the offense underlying a "second or subsequent conviction" must occur subsequent to the offense underlying the initial conviction in order to satisfy the statute's intended application only to "repeat offenses."

A writ of certiorari is appropriate to resolve the conflict which exists between the opinion below and opinions of this Court, and to settle the conflict which now exists between this published opinion and opinions in the Ninth and other circuits.

If the published opinion of the Ninth Circuit remains viable, the decision will result in a gross disparity between the federal circuits regarding the application of the extremely harsh twenty-year penalty provision of section 924(c)(1) to first time offenders.

REASONS FOR GRANTING THE WRIT

The published opinion below directly contravenes the longstanding rule that the enhanced twenty-year penalty for the "second and subsequent conviction" should not be imposed unless the "second and subsequent" offense requires proof of a different set of facts from the initial offense and was therefore a separate and distinct offense. *United States v. Castaneda,* 9 F.3d 761 (9th Cir. 1993); *United States v. Freisinger,* 937 F.2d 383, 391 (8th Cir. 1991); *United States v. Torres,* 862 F.2d 1025, 1032 (3d Cir. 1988).

By making a blanket ruling that a conspiracy and a substantive narcotics offense may always support both a first and a "second or subsequent" section 924(c)(1) conviction, irrespective of whether the same facts are relied upon to prove both alleged offenses, the published opinion is in direct conflict with the Eighth Circuit Court of Appeals

opinion in *United States v. Freisinger*, 937 F.2d 383 (8th Cir. 1991). In *Freisinger*, the Court of Appeals interpreted "second or subsequent conviction" to require that such conviction arise from a second or subsequent *transaction*. *Id.* In addition to this conflict, there is also disagreement among the circuits and judges within the circuits regarding whether the predicate offenses or the firearms are the "unit of prosecution" under section 924(c)(1). *See United States v. Taylor*, 13 F.3d 986, 993-994 (6th Cir. 1994); *United States v. Canterbury*, 2 F.3d 305, 306-307 (8th Cir. 1993).

Contrary to the law of the other circuits, and contrary to both the specific language of the statute and the legislative history of the statute, the opinion below does not require that a "second or subsequent" conviction arise from proof of separate conduct factually or temporally distinguishable from that supporting the first conviction. The published opinion thereby entirely frustrates Congress' intended application of the harsh twenty-year penalty provision of this "recidivist" statute only to "repeat offenses." *See Deal v. United States*, ____ U.S. ____, 113 S.Ct. 1993 (1993); *United States v. Neal*, 976 F.2d 601, 603 (9th Cir. 1992).

The Court of Appeals' decision is also in direct conflict with this Court's decisions interpreting the Double Jeopardy Clause. The Double Jeopardy Clause prohibits not only multiple prosecutions for the same offense, but also multiple punishments based on the same conduct. *Blockburger v. United States*, 284 U.S. 299 (1932); *United States v. Saccoccia*, 18 F.3d 795, 798-800 (9th Cir. 1994). The Double Jeopardy clause precludes a sentencing court from prescribing greater punishment than the legislature intended. *Missouri v. Hunter*, 459 U.S. 359, 366 (1983); *United States v. Smith*, 962 F.2d 923, 932 (9th Cir. 1992). Congress' intention behind section 924(c)(1) was unmistakably clear, as Representative Poff, a co-sponsor of the bill, *See United*

States v. Neal, supra., 976 F.2d at 603, specifically stated that the penalty provisions were designed:

> To persuade the man who is tempted to commit a federal felony to leave his gun at home. Any such person should understand that if he uses his gun and is caught and convicted, he is going to jail. He should further understand that if he does so a second time, he is going to jail for a longer time.

United States v. Freisinger, supra., 937 F.2d at 390-391 (*quoting United States v. Rawlings*, 821 F.2d 1543 (11th Cir.), *cert. denied*, 484 U.S. 979 (1987) and 114 Cong. Rec. 22231 (1968) (Statement of Rep. Poff)). As stated in *Freisinger*:

> Representative Poff's statement lends support to the interpretation that a "second or subsequent" conviction means one arising from a "second or subsequent" transaction. Nothing else in the legislative history makes the statute any more clear.

See also Deal v. United States, ____ U.S. ____, ____, 113 S.Ct. 1993, 2003 n. 10 (1993) (Stevens, J., dissenting).

Even if Congress' intent were not clear, the decision is at odds with the long line of decisions applying the rule of lenity to section 924(c)(1). If Congress does not fix the punishment for a federal offense clearly and without ambiguity, the rule of lenity requires that doubt be resolved against transforming a single transaction into multiple offenses. *United States v. Bass*, 404 U.S. 336, 347 (1971); *United States v. Lindsay*, 985 F.2d 666, 672-673 (2d Cir. 1993); *United States v. Freisinger*, 937 F.2d 383 (8th Cir. 1991); *United States v. Phelps*, 877 F.2d 28, 30 (9th Cir. 1989); *United States v. Godwin*, 758 F.Supp. 281 (E.D. Pa. 1991).

The decision is also at odds with other reported cases which address issues relating to the *Pinkerton* jury instruc-

tion. Under the published opinion, an individual may receive, in addition to the penalties imposed on the underlying predicate offenses, consecutive sentences totalling twenty-five years, where the two Section 924(c)(1) convictions were obtained by proof of the same facts, and the jury received an instruction based on *Pinkerton v. United States*, 328 U.S. 640 (1946), which allows an individual found to be a party to a conspiracy to be convicted of all substantive offenses committed in furtherance of the conspiracy. The opinion below is inconsistent with the opinion of the court below in *United States v. Castaneda*, 9 F.2d 761 (9th Cir. 1993). In *Casteneda*, the court below ruled that the firearm charges against Leticia Castaneda were not multiplicative because "each predicate offense relating to Leticia's firearms counts required proof of a different set of facts," but vacated all of Castaneda's section 924(c) convictions except the one predicated on the conspiracy charge, because the application of *Pinkerton v. United States* to establish her guilt on the remaining 924(c) counts violated fundamental precepts of due process. The opinion below is similarly inconsistent with *United States v. Chalan*, 812 F.2d 1302 (10th Cir. 1987), *cert. denied*, 488 U.S. 983 (1988), where the Tenth Circuit held that felony murder and robbery (where the robbery was the felony supporting the felony murder charge) were but a single crime of violence. The use of the *Pinkerton* instruction to convict individuals of both a substantive narcotics offense and a narcotics conspiracy should compel the conclusion that the two offenses should be considered a single narcotics trafficking crime, just as the felony murder and robbery in *Chalan* were considered to be a single crime of violence.

The decision below also runs afoul of the long line of decisions holding that separate offenses which constitute one criminal undertaking should not result in separate punishments. In *Prince v. United States*, 352 U.S. 322 (1957), this Court held that in the Federal Bank Robbery Act, 18 U.S.C.

§ 2113, Congress had created multiple offenses in connection with the same robbery, but that it did not intend to impose multiple punishments. 352 U.S. at 329. *See also United States v. Gaddis*, 424 U.S. 544 (1976). A number of circuit courts of appeals have applied the *Prince* rationale to the imposition of multiple sentences for a distribution of a controlled substance and the possession of that substance. *United States v. Palafox*, 764 F.2d 558, 562 (9th Cir. 1985) (en banc) (and cases cited therein). As the Court of Appeals stated in *Palafox*: "when more than one offense arises . . . from a single criminal undertaking . . . and each offense is committed at virtually the same time, in the same place, and with the same participants, the punishments should not be compounded." *Id.* at 562. The opinion below directly conflicts with this line of decisions.

This Court's decision in *Deal v. United States*, ___ U.S. ___, 113 S.Ct. 1993 (1993), which addressed the interpretation of the term "conviction" as it is used in section 924(c)(1), did not resolve the issue presented here. The issue here concerns the proper interpretation and application of the terms "second and subsequent" as used in the statute, and presents the question whether proof of the same conduct to convict of both a conspiracy and an interrelated substantive offense will allow the imposition of both the five-year and the twenty-year consecutive sentences under section 924(c)(1).

The question presented is an important one. The opinion below will require the courts of the Ninth Circuit to impose both a consecutive five-year sentence and a consecutive twenty-year sentence in any case where both a conspiracy and a substantive narcotics offense are alleged, without regard to whether different conduct is proven to ensure that the two charged offenses are separate and distinct. The opinion will result in disparate and multiplicative sentences violative of defendants' rights to due process and right to be

free from double jeopardy and cruel and unusual punishment. Given the resulting gross disparity in the imposition of the harsh twenty-year consecutive sentence, Ms. Fuentes respectfully submits that this issue presents an important question of federal law for which there is an overriding need for national uniformity and which this Court should settle.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should issue to review the order and opinion of the United States Court of Appeals for the Ninth Circuit.

Dated: February 13, 1995

Respectfully submitted,

ROBIN R. SCROGGIE
Attorney for Petitioner
Josefa Fuentes

APPENDIX

APPENDIX

No. 92-50145

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEFA FUENTES,
Defendant-Appellant.

FILED
NOV. 14, 1994
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

D.C. No. CR-91-0909-R-2

ORDER

Before: FARRIS, O'SCANNLAIN, and TROTT, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ROLANDO LOPEZ,
Defendant-Appellant.

No. 92-50137
D.C. No. CR-91-0909-R-01

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOSEFA FUENTES,
Defendant-Appellant.

No. 92-50145
D.C. No. CR-91-0909-R-2

OPINION

Appeals from the United States District Court
for the Central District of California
Manuel L. Real, Chief Judge, Presiding

Argued and Submitted
June 6, 1994 — Pasadena, California

Filed October 7, 1994

Before: Jerome Farris, Diarmuid F. O'Scannlain, and
Stephen S. Trott, Circuit Judges.

Opinion by Judge O'Scannlain

SUMMARY

Criminal Law and Procedure/Sentencing/Conspiracy

The court of appeals affirmed a district court judgment of conviction and sentence. The court held that possession with intent to distribute drugs and conspiracy to possess drugs with intent to distribute are separate offenses for purposes of sentencing a defendant for the use of firearms in relation to a drug trafficking crime.

Through informants, Drug Enforcement Agency Special Agent Jose Martinez arranged a meeting with appellants Josefa Fuentes and Rolando Lopez. Martinez purchased 25 grams of heroin from Fuentes. After Lopez and Fuentes met with the informants to transact another drug deal, Martinez arrested Lopez and Fuentes. A .38 caliber super semi-automatic pistol was found in Fuentes' purse, and agents recovered 270 grams of heroin from Fuentes' and Lopez's truck. Agents searched the Lopez-Fuentes residence and, in the master bedroom, recovered a gram of heroin and a loaded .38 caliber semi-automatic handgun. Agents also discovered a loaded AK-47 assault rifle in the trash can in the front yard of the residence.

Fuentes and Lopez were charged with conspiracy to distribute 270 grams of heroin; distributing 25 grams of heroin; possession with intent to distribute 270 grams of heroin; using and carrying a super semi-automatic .38 caliber pistol during and in relation to a drug trafficking crime — possession with intent to distribute; and, using and carrying a super semi-automatic .38 caliber pistol and a loaded AK-47 rifle during and in relation to a drug trafficking crime — conspiracy to possess heroin with intent to distribute. A jury convicted them on all counts. The jury specifically found that Lopez and Fuentes used both firearms — the .38 caliber pistol found in the house and the AK-47 found in the

trash can — in relation to their conspiracy to distribute heroin.

On the firearms offenses, the district court sentenced Lopez and Fuentes to five years and twenty years. The district court ordered their firearms sentences to run consecutively to each other and to the sentence imposed for the narcotics offenses. The statute dealing with the use of firearms in relation to a drug trafficking crime, 18 U.S.C. § 924(c)(1), states that upon a "second or subsequent conviction," the defendant shall be sentenced to twenty years. Lopez and Fuentes appealed their convictions and sentences.

[1] The government linked the .38 caliber super semi-automatic pistol in Fuentes' purse to the possession with intent to distribute count. The government separately linked the loaded .38 caliber semi-automatic and the AK-47 discovered at the residence to the conspiracy count. Each firearm was tied to a separate offense.

[2] Even if the .38 caliber firearm was found, as Fuentes contended, on a high shelf of the closet, a reasonable jury could determine that the firearm was used in relation to drug trafficking.

[3] Lopez and Fuentes argued that there was not a "second or subsequent conviction" as required by § 924(c)(1), but rather there was one § 924(c) offense involving three weapons. [4] However, possession with intent to distribute and conspiracy are two separate offenses for § 924(c) purposes. The Fifth Circuit was correct when it previously reasoned that a defendant's conspiracy conviction and his conviction of possession with intent to distribute each could support a separate § 924(c) conviction and sentence. [5] Moreover, there is no requirement that the second conviction referred to in § 924(c) be obtained in a different proceeding than the first.

COUNSEL

Elaine Morinelli, Morinelli & Lieberman, Oakland, California, for defendant-appellant Lopez. Robin R. Scroggie, Los Angeles, California, for defendant-appellant Fuentes.

Steven M. Arkow, Assistant United States Attorney, Los Angeles, California, for the plaintiff-appellee.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide, among other issues, whether a substantive crime and a conspiracy to commit that crime are separate offenses for sentence enhancement purposes.

I

During September 1991, the Drug Enforcement Agency ("DEA") was conducting an investigation of appellants Fuentes and Lopez. Special Agent Jose Martinez arranged a meeting with them through informants Maria Arellano and Arturo Rodriguez. On September 30, 1991, Arellano called Fuentes to arrange a heroin deal.

On October 1, 1991, Agent Martinez purchased 25 grams of heroin from Fuentes for $3,200. Martinez told Fuentes he was interested in purchasing large quantities of heroin. Martinez testified that Fuentes told him that she had to check with her source, whom she implied was her husband, Lopez.

On October 15, 1991, Martinez called Fuentes to arrange another heroin purchase. The next day, Martinez tape-recorded a phone conversation in which Lopez told Arellano that he was prepared to sell ten ounces of heroin that day.

On October 16, 1991, Lopez and Fuentes met with Arellano and Rodriguez in a Burger King parking lot to

transact the drug deal. After confirming that they had brought the heroin, Rodriguez signaled Martinez to arrest them. DEA Special Agent Christina DeBevoise participated in the arrest and searched Fuentes and their Ford Explorer. She found a .38 caliber super semi-automatic pistol in Fuentes' purse and the agents recovered 270 grams of heroin from the cab of the truck.

The agents then went to and searched the Lopez-Fuentes residence. In the master bedroom, agents recovered 1 gram of heroin from the top drawer in the dresser, as well as a loaded and cocked .38 caliber semi-automatic handgun. On top of the dresser there were several boxes of plastic baggies, a triple beam scale, and a silver metal spoon. A piece of jewelry in the shape of an AK-47 assault rifle was on top of the vanity and was later put into evidence.[1] Approximately $38,000 in cash was discovered in a purse hanging in the closet of the master bedroom. Agents also discovered a loaded AK-47 assault rifle in the trash can in the front yard of the residence.

On October 29, 1991, Fuentes and Lopez were charged in a five-count indictment[2] with conspiracy to distribute 270 grams of heroin in violation of 21 U.S.C. § 846 (count one); distributing 25 grams of heroin in violation of 21 U.S.C. § 841(a)(1) (count two); possession with intent to distribute 270 grams of heroin in violation of 21 U.S.C. § 841(a)(1) (count three); using and carrying a super semi-automatic .38 caliber pistol on October 16, 1991 during and in relation to a drug trafficking crime — possession with intent to distribute — as charged in count three (count four); and using and carrying a super semi-automatic .38 caliber pistol and a loaded AK-47 rifle on October 16, 1991

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[1] This was apparently done to impeach Fuentes' testimony that she did not know what an AK-47 looked like.

[2] Only Fuentes was charged with count two.

during and in relation to a drug trafficking crime — conspiracy to possess heroin with intent to distribute — as charged in count one (count five).

In arguing an in limine motion at a pretrial hearing, the government stated that it would not introduce a photograph of Lopez with a firearm in his waistband in its case-in-chief. However, the government said that it intended to use the photograph for impeachment purposes and pursuant to Federal Rule of Evidence 404(b) if the defense claimed that Lopez did not have experience or familiarity with firearms. The district court ruled that the government could use the photograph "if somebody else takes the stand and tries to exculpate him in that respect." During the trial, the government introduced the photograph after Fuentes testified that she had not seen her husband with other guns.

A jury convicted Lopez and Fuentes on all counts after a three-day trial. Because two different firearms were mentioned in count five, the district court instructed the jury that, in order to convict, it had to agree which firearm was used in relation to drug trafficking. The jury specifically found that appellants had used both firearms — the .38 caliber pistol found in the dresser and the AK-47 found in the trash can — in relation to their conspiracy to distribute heroin.

The district court sentenced Lopez and Fuentes on the Title 21 narcotics offenses — counts one, two (for Fuentes only), and three — to 63 months imprisonment, and on the Title 18 firearms offenses — counts four and five — to five years and twenty years. The court ordered the firearms sentences to run consecutively to each other and to the 63 months imposed for the narcotics offenses, for a total of thirty years. The court also ordered four years of supervised release, following incarceration.

Lopez and Fuentes raise a number of claims attacking their convictions and sentences. Because Fuentes testified that appellants sold heroin and possessed the drug trafficking paraphernalia, this appeal deals primarily with counts four and five, the firearms counts.

II

Fuentes argues that the jury instructions on the firearms counts were inadequate because the jury could have convicted her on the basis of the mere presence of a firearm, which is impermissible. *See United States v. Phelps,* 877 F.2d 28, 30 (9th Cir. 1989). "To convict under 18 U.S.C. § 924(c), the government must establish that the defendant committed a [drug trafficking] crime . . . and that he knowingly used or carried a firearm while committing the crime." *United States v. Streit,* 962 F.2d 894, 899 (9th Cir.), *cert. denied,* 113 S.Ct. 431 (1992). "The government also must prove that the defendant's possession of the firearm played at least an indirect role in the underlying offense." *Id.* In other the firearm must be used or carried in relation to the drug trafficking crime. 18 U.S.C. § 924(c); *United States v. Martinez,* 967 F.2d 1343, 1346 (9th Cir. 1992).

Fuentes contends that "[t]he District Court did not instruct the jury that a relation between the firearm and the underlying offense was required." She is wrong. The district court instructed the jury that to "use or carry a firearm" meant "having a firearm available to *assist or aid* in the commission of the crime alleged in counts one and three [the drug trafficking counts] of the indictment" (emphasis added).[3] Further, the district court specifically instructed

[3]The district court also instructed that: "In determining whether a defendant used or carried a firearm, you may consider all of the factors that have been received in evidence including the nature of the underlying drug trafficking crime alleged, the proximity of the defendant to the

that, in order to convict, "there must be evidence that the firearm was available to provide protection to the defendant or intimidate others *in connection with* his or her involvement in drug trafficking" (emphasis added). This instruction is consistent with our precedent holding that the "in relation to" requirement can be satisfied even if the gun is never drawn or within reach, if it emboldens the defendant to act. *United States v. Torres-Medina,* 935 F.2d 1047, 1049-50 (9th Cir. 1991).

Fuentes requested a jury instruction that the jury could not conflict unless it found that the firearms "facilitated or had a role in a narcotics trafficking offense." The district court's instructions to the jury were substantively the same. The appellant's preference for alternative language is not grounds for reversal when the district court's instructions covered the issue. *See United States v. Miller,* 688 F.2d 652, 662 (9th Cir. 1982). Based on the instructions that were given, the jury could not have convicted based on the mere presence of a firearm.

III

[1] Appellants contend that there was insufficient evidence to support their convictions on counts four and five (the firearms counts). "When there are multiple § 924(c) charges, the indictment must tie each firearm charge to a separate offense." *United States v. Castaneda,* 9 F.3d 761, 765 (9th Cir. 1993), *cert. denied,* 114 S.Ct. 1564 (1994). In this case, the government linked the .38 caliber super semi-automatic pistol in Fuentes' purse on October 16, 1991 to the possession with intent to distribute count. The government separately linked the loaded and cocked .38 caliber semi-automatic and the AK-47 discovered in the appellants'

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firearm in question, the usefulness of the firearm to the crime alleged and the circumstances surrounding the presence of the firearm."

bedroom and trash can, respectively, to the conspiracy count. In other words, the firearm charged in count four was linked to the possession with intent to distribute charged in count three. And the firearms charged in count five were linked to the conspiracy charged in count one. Therefore, each firearm was tied to a separate offense.

A

With respect to count four, Fuentes contends that the pistol in her purse was not carried "in relation to" the heroin deal because she was on friendly relations with her buyer, informant Arellano. This argument is unpersuasive. First, the jury could have easily determined that Fuentes' self-serving testimony lacked credibility. *See United States v. Martinez*, 967 F.2d 1343, 1346 (9th Cir. 1992). Second, the firearm may have been present, not because appellants feared trouble from their buyer, but in case the police or other drug dealers interfered with the deal. Because Fuentes had a .38 caliber super semi-automatic pistol in her purse during a drug deal, a reasonable jury could conclude that she carried a firearm in relation to drug trafficking. *See Torres-Medina*, 935 F.2d at 1050 ("the defendant need not have drawn [her] weapon or fired rounds").

[2] With respect to count five, Fuentes contends that the .38 caliber firearm was not in the top drawer of the dresser, as the government agents testified, but was on a high shelf of the closet. Her argument is irrelevant because, even if the firearm were on a shelf in the closet, a reasonable jury could determine that this firearm was used in relation to drug trafficking. In *Torres-Medina*, this court held that a paraplegic used a firearm in relation to drug trafficking even though both the drugs and firearm were kept in a narrow crawlspace and he was physically incapable of retrieving the gun himself. 935 F.2d at 1050. The facts are much stronger in this case. Indeed, the court in *Torres-Medina* said, "[i]f

Torres-Medina were not handicapped and unable to access the narrow passage leading to the cavity, this would be an easy case, since a gun stored below a house where drug dealing occurs certainly is 'available' in the sense just described." *Id.*

Fuentes also contends that a reasonable jury could not have found that the AK-47 discovered in the trash can in the front yard was used in relation to drug trafficking. She argues that she had never seen the firearm before and that anybody could have put the gun there. Her argument is unpersuasive. The jury clearly disbelieved Fuentes' testimony and concluded that the AK-47 was hers. Such credibility determinations are the province of the jury. *Martinez*, 967 F.2d at 1346. In addition, even without the AK-47, there is still sufficient evidence to conflict Fuentes of count five based on the .38 caliber firearm alone, which she admits is hers and was kept in her house.

B

Lopez contends that "[w]eapons miles away from the act of the drug trafficking itself could not be 'quickly available' to appellant Lopez." Lopez appears to be arguing that the .38 caliber pistol and AK-47 discovered at his house were not related to the possession with intent to distribute charge. Lopez misconstrues the jury's verdict and the government's argument. The firearms discovered at appellants' residence were not linked to the drug sale in the parking lot. The pistol in Fuentes' purse was the firearm used on that count. The firearms at his residence were linked only to the conspiracy count.

Lopez further argues that "even if the .38 caliber handgun in the home could not have arguably been available to appellant Lopez, the AK-47 was not 'inextricably intertwined' with the underlying drug trafficking offense." Lopez proceeds to argue exclusively about the AK-47, but his

argument is irrelevant because he concedes the .38 caliber pistol was "found near drugs and paraphernalia in the home." this is all that is necessary to convict Lopez on count five. Only one firearm needed to be linked to the conspiracy to engage in drug trafficking. Therefore, the .38 caliber firearm alone is sufficient evidence for a jury to have convicted Lopez on count five.

IV

[3] Both Lopez and Fuentes contend that the district court erred in sentencing them on counts four and five (the firearms offenses) to five and twenty years imprisonment, to run consecutively to each other and to the five-year term of imprisonment imposed on counts one, two and three. Section 924(c)(1) reads: "In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years . . . ." 18 U.S.C. § 924(c)(1). Lopez and Fuentes argue that there is not a "second or subsequent conviction" as required by 18 U.S.C. § 924(c)(1), but rather that there was one section 924(c) offense involving three weapons.

[4] The argument that there were not two offenses is flawed because possession with intent to distribute and conspiracy are two separate offenses for section 924(c) purposes. The Fifth Circuit has explained that "[d]rug trafficking crimes separated by the measure of the double jeopardy clause can each support § 924(c) convictions." *United States v. Privette*, 947 F.2d 1259, 1262 (5th Cir. 1991) (citing, inter alia, *United States v. Fontanilla*, 849 F.2d 1257 (9th Cir. 1988)), *cert. denied*, 112 S. Ct. 1279 (1992). It is now well established that "[a] substantive crime and a conspiracy to commit that crime are not the same offense for double jeopardy purposes." *United States v. Saccoccia*, 18 F.3d 795, 798 (9th Cir. 1994) (citing *United States v. Felix*, ___ U.S. ___, 112 S. Ct. 1377, 1384

(1992)). Indeed, the Fifth Circuit in *Privette* specifically reasoned that a defendant's "conviction of conspiracy and his conviction of possession with intent to distribute could each support a separate § 924(c) conviction and sentence." *Privette*, 947 F.2d at 1262. We find the Fifth Circuit's conclusion persuasive and consistent with our own case law. We note also that, if there are two separate section 924(c) offenses, the sentences cannot run concurrently, but must be consecutive. 18 U.S.C. § 924(c);[4] *Fontanilla*, 849 F.2d at 1258-59.

[5] Lopez and Fuentes also suggest that the second conviction referred to in section 924(c) must be obtained in a separate proceeding. We disagree. There is no requirement that the second conviction be obtained in a different proceeding than the first. *See Deal v. United States*, 113 S. Ct. 1993, 1997 (1993). Indeed, this court has held that the same underlying chain of events tried in one criminal proceeding can supply the first and second convictions under section 924(c). *Fontanilla*, 849 F.2d at 1258-59.

Lopez and Fuentes also argue that under the rule of lenity, the court should find that section 924(c) is ambiguous. "The mere possibility of articulating a narrow construction, however, does not by itself make the rule of lenity applicable." *Smith v. United States*, 113 S. Ct. 2050, 2059 (1993). As long as each firearm is linked to a separate predicate offense, there are two separate convictions under section 924(c). *Privette*, 947 F.2d at 1262. The second one of these would clearly be a "second or subsequent convic-

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[4]Section 924(c)(1) reads: "Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, *nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.*" (emphasis added).

tion." Because the common usage of the word "second" in this case is consistent with the sentence imposed, the rule of lenity does not apply. *See Smith*, 113 S. Ct. at 2060.

V

Fuentes claims that her sentence of thirty years imprisonment constitutes cruel and unusual punishment. The Eighth Amendment "forbids only extreme sentences that are 'grossly disproportionate' to the crime." *United States v. Bland*, 961 F.2d 123, 129 (9th Cir.), *cert. denied*, 113 S. Ct. 170 (1992) (citations and internal quotations omitted).

Fuentes presents no case law to support her claim that her sentence is grossly disproportionate. Furthermore, "as a general rule, '[i]t is for Congress to say what shall be a crime and how it shall be punished....' '[A] sentence which is within the limits set by a valid statute may not be overturned on appeal as cruel and unusual.' " *Unites States v. Klein*, 860 F.2d 1489, 1495 (9th Cir. 1988) (citations omitted). The sentence in this case was mandated by section 924(c). Fuentes presents no argument for why we should depart from the general rule and hold that a congressionally-imposed sentence violates the Eighth Amendment.

Finally, this court has upheld the imposition of a twenty-year minimum sentence for drug trafficking when there is a prior drug-related conviction. *United States v. Kinsey*, 843 F.2d 383, 392-93 (9th Cir.), *cert. denied*, 488 U.S. 836 (1988). *See also United States v. Hamblin*, 911 F.2d 551, 555 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2241 (1991). Therefore, the punishment in this case is not cruel and unusual.

VI

Fuentes argues that the district court abused its discretion by limiting testimony on her reason for possessing firearms.

This argument is clearly meritless. First, she testified over ten times that she kept firearms for protection and/or for a gun collection.

Second, any error was harmless. This court holds that "error is harmless if it is more probable than not that the prejudice resulting from the error did not materially affect the verdict." *United States v. Lui*, 941 F.2d 844, 848 (9th Cir. 1991) (citation omitted). This standard is clearly met with respect to both firearms counts. Count Four charged bringing a firearm to the sale of 270 grams of heroin. Fuentes' argument that she collected guns and had them to protect her children and business does not address why she brought a super semi-automatic handgun to the drug deal. Similarly, for count five, testimony regarding Fuentes' purpose for possessing firearms is entirely irrelevant to the AK-47 because Fuentes steadfastly denied that she had ever seen the gun before.

VII

Fuentes contends that the district court erred by admitting the jewelry in the shape of an AK-47 and the photograph of Lopez with a gun in his waistband.[5] She applies the wrong standard of review and does not make any argument for how the district court's ruling constitutes an abuse of discretion. Fuentes never fully addresses the government's argument that the evidence was properly admitted to impeach Fuentes; she merely asserts that the evidence was more prejudicial than probative, but does not suggest how this rises to the level of abuse of discretion.

Even if the district court abused its discretion, the admission of the jewelry and photograph would constitute harmless error. "[U]nless there is a reasonable possibility that

[5]Only Fuentes, not Lopez, argues that the admission of the picture of Lopez was an abuse of discretion.

the improperly admitted evidence contributed to the conviction, reversal is not required." *Lui*, 941 F.2d at 848 (quoting *Schneble v. Florida*, 405 U.S. 427, 432 (1972)). Fuentes presents no argument for how the admission of this evidence contributed to her conviction. Clearly, it did not. Regarding count four, Fuentes admitted that she was selling heroin and that the gun found in her purse was hers. Regarding count five, Fuentes admitted that all of the drug trafficking paraphernalia obtained from her bedroom, as well as the gun found in the bedroom, belonged to the appellants. Her only argument was that the gun was not in the dresser, but in the closet. This is irrelevant because in either case, the gun was available for section 924(c) purposes. *See* Part III. Therefore, this argument does not warrant reversal.

VIII

Fuentes argues that the district court erred by admitting the testimony of Agent DeBevoise that she noticed the weight of the gun in Fuentes' purse.

Fuentes contends that this testimony was not admissible under Federal Rule of Evidence 701 because "Agent DeBevoise made no mention of . . . how much her gun weighs in relation to the gun found in Ms. Fuentes' purse." Fuentes argues that without such a weight comparison, the testimony is not "helpful to a clear understanding of the witness' testimony," as required by Rule 701.[6]

This argument is clearly wrong. Agent DeBevoise testified: "I would say the majority of [weight in Fuentes' purse] was due to the gun because I carry my gun in my purse on a daily basis and I find that when I take my gun in and out of my purse I know if it is there or not. It is pretty heavy. And

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[6] Federal Rule of Evidence 701 requires that lay opinion testimony be "helpful to a clear understanding of the witness' testimony or the determination of a fact or issue."

my gun is much smaller than the weapon she was carrying" (emphasis added).

Fuentes presents no argument to suggest how the district court's ruling constituted a clear abuse of discretion. We find no abuse.

IX

Finally, Lopez argues that he should be allowed a two-point adjustment for acceptance of responsibility. The district court found to the contrary. Its determination is not clearly erroneous.

All of Lopez' and Fuentes' arguments are without merit.

AFFIRMED.

United States of America vs. Josefa Fuentes,
11242 Borden Avenue,
Pacoima, California
Docket No. CR-91-909-R
Social Security No. 626-03-0316
Mailing Address

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person on this date February 10, 1992

COUNSEL ☐ WITHOUT COUNSEL However, the Court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the Court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL Robin Scroggie, rtd
(Name of Counsel)

PLEA ☐ GUILTY, and the Court being satisfied that there is a factual basis for the plea.
☐ NOLO CONTENDERE ☐ NOT GUILTY

FINDING There being a finding/verdict of ☒ GUILTY, defendant has been convicted as charged of the offense(s) of: conspiracy in violation of 21 U.S.C § 846 as charged in count 1; possession with intent to distribute and distribution of controlled substance in violation of 21 U.S.C § 841(a)(1) as charged in counts 2 and 3; and using and carrying a firearm in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1) as charged in counts 4 and 5 of the Indictment.

JUDGMENT AND PROB./ COMMITMENT ORDER

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of:

sixty-three (63) months on each of counts 1, 2, and 3 to run concurrently; five (5) years on count 4 and twenty (20) years on count 5, said sentences on counts 4 and 5 are to run consecutive to each other and consecutive to term of imprisonment imposed

on counts 1, 2, and 3 for a total of 363 months. Upon release from imprisonment, the defendant shall be placed on supervised release for a term of four (4) years on counts 1, 2, and 3 and three (3) years on each of counts 4 and 5 all such terms to run concurrently on the following terms and conditions: comply with the rules and regulations of the Probation Office and General Order 318; shall comply with the rules and regulations of the Immigration and Naturalization Service (INS), and if deported from this country, either voluntarily or involuntarily, not re-enter the United States illegally. Upon any re-entry to the United States during the period of supervised release, defendant shall report to the nearest Probation Office within 72 hours.

IT IS ORDERED, pursuant to Sec. 5E1.2(f), the fine and costs are waived.

IT IS FURTHER ORDERED, the defendant shall pay a special assessment of $250.00.

IT IS FURTHER ORDERED, upon release from imprisonment the defendant shall be referred to the Immigration & Naturalization Service for consideration of status in the United States.

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release set out on the reverse side of this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

☐ This is a direct commitment to the Bureau of Prisons, and the Court has NO OBJECTION should the Bureau of Prisons designate defendant to a Community Corrections Center.

Signed By:

☒ U.S. District Judge /s/ MANUEL L. REAL
Manuel L. Real

☐ U.S. Magistrate _____

It is ordered that the Clerk deliver a certified copy of this Judgment and Probation/ Commitment Order of the U.S. Marshal or other qualified officer.

LEONARD A. BROSNAN, CLERK

Dated/Filed February 11, 1992

By Carolyn Trump
Deputy Clerk

AO-245-A (01/90)